

E-filing

FILED

2010 APR -6 P 3:22

RICHARD W. VIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT E. BELSHAW (SBN 142028)
OF COUNSEL
GUTIERREZ & ASSOCIATES
244 California St. Ste.300
San Francisco, California 94111
Telephone: (415) 956-9590
Facsimile: (415) 986-8606

Attorneys for Plaintiff
American Small Business League

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JL

CV 10 1459

AMERICAN SMALL BUSINESS LEAGUE

CASE NO.

Plaintiff,

COMPLAINT FOR INJUNCTIVE
RELIEF

v.

FREEDOM OF INFORMATION ACT
(5 U.S.C. 552 (a)(3)(A))

UNITED STATES SMALL BUSINESS
ADMINISTRATION

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, ("FOIA") for injunctive and other appropriate relief to compel the disclosure and release of documents improperly withheld from Plaintiff by the Small Business Administration.

JURISDICTION AND VENUE

2. This court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

THE PARTIES

3. Plaintiff is the American Small Business League ("ASBL"), an organization incorporated in California which has its principal place of business in Sonoma County, California. ASBL is a national organization established to research and focus public attention on emerging small business issues and to otherwise promote the interests of small businesses. ASBL's activities include the review of evolving federal and state government policy and procedures to determine possible impact on small business. .

4. Defendant U.S. Small Business Administration (hereinafter "SBA") is an "agency" within the meaning of 5 U.S.C. § 552 (f).

PLAINTIFF'S FOIA REQUEST AND THE SBA'S RESPONSE

5. On or about April 29, 2009 pursuant to the Freedom of Information Act ("FOIA"), ASBL requested records consisting of "contracts or agreements between SBA and any firm engaged in public relations, public relations consulting, or lobbying that was in effect during FY 2007". A true and correct copy of the request is attached hereto as Exhibit A.

6. On April 30, 2009 the SBA acknowledged ASBL's FOIA request by notifying ASBL that the request had been referred to its Office of Administration for review.

7. On that same date, April 30, 2009, ASBL received an email from the SBA Office of Business Operations asking that ASBL identify a particular contractor in order to narrow the search. Because ASBL had no information regarding the identity of any specific contractor providing public relations, public relations consulting, or lobbying services to the SBA, it originally declined to narrow the scope of its request. However, that same day, ASBL subsequently agreed to narrow its request to encompass only "documents that would indicate the names of the firms and dollar amounts that were awarded to those firms, for the **four** largest SBA contracts with public relations firms, public relations consultants or any firm engaging in media activities, particularly those services used by the Administrator or the SBA Press Office".

1 A true and correct copy of the ASBL- SBA email correspondence of April 30, 2010 reflecting
2 the above referenced discussions is attached hereto as Exhibit B.

3 8. On May 6, 2009, the SB responded to ASBL's request by providing information
4 on only **two** firms – and two contracts, stating “We have provided information on two
5 firms...but have withheld some of the data based on Exemption 4 which protects trade secrets
6 and commercial or financial information obtained from a person and privileged or confidential,
7 the release of which could be competitively harmful to the submitter of the information; which
8 could impair the government's ability to obtain similar necessary information in a purely
9 voluntary manner in the future; and which could effect other government interests, such as
10 program effectiveness and compliance.” The SBA did not identify which of the quoted concerns
11 it was relying on in citing Exemption 4. (5 U.S.C. § 552 (b)(4)). The Agency did not explain
12 why it was providing information on only two contracts, nor did it specifically identify what
13 type of information it was withholding. A true and correct copy of the SBA response is
14 attached hereto as Exhibit C.

15 9. ASBL appealed SBA's refusal to provide the all of the information requested by
16 letter dated June 4, 2009. On July 14, 2009 the Freedom of Information / Privacy Acts Office
17 within the SBA upheld the determination. Again, the SBA did not identify which of the quoted
18 concerns it was relying on in citing Exemption 4. (5 U.S.C. § 552 (b)(4)), nor did it specifically
19 identify what type of information it was withholding, nor did it make any attempt to explain why
20 it was providing information on only two contracts. True and correct copies of the ASBL's
21 appeal and the SBA's response are attached hereto as Exhibits D and E.

22 10. ASBL has a right of access to the documents requested pursuant to 5 U.S.C. §
23 552 (a)(3), and there is no legal basis for the SBA's denial of such access. Accordingly, ASBL
24 seeks an order from this court compelling the SBA provide the requested information
25 “consisting of documents which indicate the names of firms and dollar amounts that were
26 awarded to those firms for the four largest SBA contracts with public relations firms, public
27 relations consultants or any firm engaging in media activities particularly those services used by
28 the Administrator or the SBA Press Office in fiscal year 2007.

CAUSE OF ACTION

**Violation of the Freedom of Information Act
for Wrongful Withholding of Agency Records**

11. The SBA has wrongfully withheld documents requested by ASBL.

12. ASBL has exhausted the administrative remedies with respect to the SBA's wrongful withholding of the requested documents.

13. ASBL is entitled to injunctive relief and an order from this Court compelling an immediate release and disclosure of the requested documents.

PRAYER FOR RELIEF

WHEREFORE, ASBL prays that this Court:

- A. Issue an order compelling the SBA to disclose all responsive documents in their entirety;
- B. Provide for expeditious proceedings in this action;
- C. Award ASBL its costs and reasonable attorneys' fees incurred in this action;
- and
- D. Grant such other relief as the Court may deem just and proper.

Dated: April 6, 2010

GUTIERREZ & ASSOCIATES

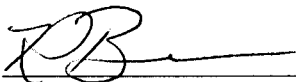
By: 
ROBERT E. BELSHAW
Attorneys for Plaintiff

EXHIBIT A

Initial Request

April 29, 2009

Chief, Freedom of Information/Privacy Acts Office
Small Business Administration
409 3rd Street, SW, Suite 5900
Washington, DC 20416

Re: Freedom of Information Act Request

Dear FOIA Officer:

This is a request under the Freedom of Information Act. I request that a copy of documents containing the following information be provided to me:

- Copies of any contracts or agreements between the SBA and any firm engaged in public relations, public relations consulting, or lobbying that was in effect during FY 2007.

In order to help to determine my status for purposes of determining the applicability of any fees, you should know that I am the Director of Communications for a small business advocacy group and am seeking information for use in our group's research and not for commercial use.

The American Small Business League is willing to pay fees for this request up to a maximum of \$1000. If you estimate that the fees will exceed this limit, please inform me first.

I have included a telephone number at which I can be contacted during the hours of 8 a.m. to 5 p.m. Pacific, if necessary to discuss any aspect of my request.

Thank you for your consideration of this request.

Sincerely,

Christopher Gunn, Communications Director
American Small Business League
3910 Cypress Dr.
Petaluma CA, 94954
(707) 789-9575

A

EXHIBIT B

Chris Gunn

Subject: FW: PLEASE IGNORE PREVIOUS EMAIL -- RE: ASBL 20090429 - FOIA - 2009April4

From: Chris Gunn
Sent: Thursday, April 30, 2009 3:56 PM
To: 'patricia.cullum@sba.gov'
Subject: PLEASE IGNORE PREVIOUS EMAIL -- RE: ASBL 20090429 - FOIA - 2009April4

Mrs. Cullum,

Please ignore my previous email. Our initial request was for, "Copies of any contracts or agreements between the SBA and any firm engaged in public relations, public relations consulting, or lobbying that was in effect during FY 2007." However, to clarify and redefine our request, we would like to request **documents that would indicate the names of the firms and dollar amounts that were awarded to those firms, for the four largest SBA contracts with public relations firms, public relations consultants or any firm engaging in media activities, particularly those services used by the Administrator or the SBA Press Office.** Thank and please let me know if you have any questions.

Best regards,
Chris Gunn

--

Christopher Gunn | Communications Director
American Small Business League
707.789.9575w | 707.696.6633m | 707.789.9580f
cgunn@asbl.com | www.asbl.com

From: Chris Gunn
Sent: Thursday, April 30, 2009 12:42 PM
To: 'Cullum, Patricia H.'
Subject: RE: ASBL 20090429 - FOIA - 2009April4

Mrs. Cullum,

Thank you for reaching out. We do not wish to narrow our request. Please let me know if you have any questions. To clarify, we have requested, "Copies of any contracts or agreements between the SBA and any firm engaged in public relations, public relations consulting, or lobbying that was in effect during FY 2007." Thank you and I look forward to your response.

Best regards,
Chris Gunn

--

Christopher Gunn | Communications Director

4/30/2009

B

American Small Business League
707.789.9575w | 707.696.6633m | 707.789.9580f
cgunn@asbl.com | www.asbl.com

From: Cullum, Patricia H. [mailto:patricia.cullum@sba.gov]
Sent: Thursday, April 30, 2009 10:29 AM
To: Chris Gunn
Subject: FW: ASBL 20090429 - FOIA - 2009April4

Good Afternoon Mr. Gunn,

I received your FOIA request, see below, and I would like some additional information to assist me in preparing a response. Could you please tell me if you have a particular contractor that you are interested in or provide more specific instructions indicating what you are actually looking for. By narrowing the search through files, it will save substantial fees. Once I receive this additional information, I will be happy to prepare a response.

Thank you for your request.

Patty Cullum
Small Business Administration
Office of Business Operations

From: FOIA
Sent: Thursday, April 30, 2009 7:16 AM
To: 'Chris Gunn'
Subject: RE: ASBL 20090429 - FOIA - 2009April4

April 30, 2009

Chris Gunn, Communications Director
American Small Business League
3910 Cypress Dr.
Petaluma, CA 94954

Re: FOIA #27410

Dear Mr. Gunn:

Our office is in receipt of your attached Freedom of Information Act (FOIA) request pertaining to Small Business Administration contracts or agreements.

This office operates in the appellate capacity and refers all initial FOIA requests to the appropriate program or field office. Therefore your request is being referred to the Office of Administration for initial FOIA review, fee assessment and direct response to you. Any inquiries regarding your request

4/30/2009

B

should be directed to that office at either (202) 205-1904 or (202) 205-7313.

Please feel free to contact us on (202) 401-8203 if we can be of further assistance.

Sincerely,

Lisa J. Babcock
Chief, Freedom of Information
Privacy Acts Office

4/30/2009

B

EXHIBIT C



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

May 6, 2009

Mr. Christopher Gunn
Communications Director
American Small Business League
3910 Cypress Drive
Petaluma, CA 94954

Dear Mr. Gunn:

This refers to your Freedom of Information Act (FOIA) request dated April 29, 2009. You requested, pursuant to FOIA, all records that relate to the contracts between the U.S. Small Business Administration (SBA) and any firm engaged in public relations, public relations consulting or lobbying during FY 2007.

We have provided information on two firms. The first had provided media training. The second was for speech writing services, but have withheld some of the data based on Exemption 4 which "protects trade secrets and commercial or financial information obtained from a person and privileged or confidential the release of which could be competitively harmful to the submitter of the information; which could impair the government's ability to obtain similar necessary information in a purely voluntary manner in the future; and, which could affect other governmental interests, such as program effectiveness and compliance."

You have the right to appeal this decision to the Chief, Freedom of Information/Privacy Acts Office, U.S. Small Business Administration, 409 3rd Street, SW, Washington, D.C., 20416. You must submit a written, signed appeal within 60 calendar days of the date of the notice of denial. Your appeal should contain a description of the information denied, the name and title of the SBA employee who denied the request, the reason for denial, and other pertinent facts you deem appropriate.

Thank you for your request.

Sincerely,

Ajoy Sinha
Acting Director
Office of Business Operations

EXHIBIT D

American

**small
business**

League

98% of all U.S. firms have less than 100 employees

June 4, 2009

Chief, Freedom of Information/Privacy Acts Office
Small Business Administration
409 3rd Street, SW, Suite 5900
Washington, DC 20416

Re: FOIA Request # 27410

Dear FOIA Officer:

This is an appeal under the Freedom of Information Act.

On 4/29/2009, I requested the following documents from the Small Business Administration (SBA).

- Copies of any contracts or agreements between the SBA and any firm engaged in public relations, public relations consulting, or lobbying that was in effect during FY 2007.

On April 30, 2009, I received an email from Mrs. Patty Cullum of the SBA requesting, "additional information to assist me in preparing a response...By narrowing the search through files, it will save substantial fees."

The ASBL immediately responded to Mrs. Cullum's request by clarifying and redefining its request to, "documents that would indicate the names of the firms and dollar amounts that were awarded to those firms, for the *four largest SBA contracts* with public relations firms, public relations consultants or any firm engaging in media activities, particularly those services used by the Administrator or the SBA Press Office."

On May 11, 2009, I received a letter from Mr. Ajoy Sinha, Acting Director of the Office of Business Operations dated May 6, 2009 letter, which stated:

"We have provided information on two firms. The first had provided media training. The second was for speech writing services, but have withheld some of the data based on Exemption 4 which "protects trade secrets and commercial or financial information obtained from a person and privileged or confidential the



release of which could be competitively harmful to the submitter of the information; which could impair the government's ability to obtain similar necessary information in a purely voluntary manner in the future; and, which could affect other governmental interests, such as program effectiveness and compliance."

It is our understanding that contracts entered into by the federal government are subject to release under the FOIA.

To date, I have not received the information requested in my request; therefore, I am appealing the request.

I have included a copy of my original request. Thank you for your consideration of this appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Gunn", with a long horizontal flourish extending to the right.

Mr. Christopher Gunn
3910 cypress Dr.
Petaluma, CA 94954
707-789-9575
cgunn@asbl.com

EXHIBIT E

JMT
2007/11/21 - 7 -
PR correct as
SBAU.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416CERTIFIED MAIL – RETURN RECEIPT REQUESTED

July 14, 2009

Mr. Christopher Gunn
American Small Business League
3910 Cypress Drive
Petaluma, California 94954

Re: FOIA Appeal # 27702
FOIA #27410

Dear Mr. Gunn:

This letter constitutes our final response to your June 4, 2009, Freedom of Information Act (FOIA) appeal received in this office on June 16, 2009. You are appealing "Mr. Ajoy Sinha, Acting Director of the Office of Business Operations, May 11, 2009 response to the American Small Business League's initial FOIA request dated April 29, 2009." You are specially appeal the information the Office of Business Operations withheld.

This office has reviewed the pertinent documents you have appealed and it is our determination to uphold the initial disclosure decision of Mr. Sinha. The information is withheld pursuant to Exemptions 4 of the FOIA.

Exemption 4 (5 U.S.C. 552(b)(4)) allows the discretion to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential" the release of which could be competitively harmful to the submitter of the information; which could impair the government's ability to obtain similar necessary information in a purely voluntary manner in the future; and, which could affect other governmental interests, such as program effectiveness and compliance.

Exemption 4 is cited to protect commercial information, the Court upheld in Gulf & Western Industries v. United States, 615 F.2d 527 (D.C. Cir. 1979) that exemption 4 protects information that is commercial or financial obtained from a person, and privileged or confidential. The Department of Justice advises that "the term 'person' refers to wide range of entities." In addition, information is considered "commercial" so long as the submitter has a "commercial interest" in it. See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) and Washington Post v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982).

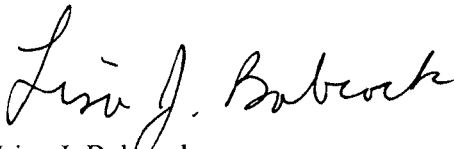


Mr. Gunn
Page 2

In accordance with 13 CFR § 102.6, we are not assessing charges for processing your appeal.

You have exhausted your administrative remedies for access to the information that we continue to withhold. You may pursue this matter in the United States District Court for the district in which you reside or have your principal place of business, where the records are located, or in the District of Columbia.

Sincerely,

A handwritten signature in cursive script, reading "Lisa J. Babcock".

Lisa J. Babcock
Chief, Freedom of Information/
Privacy Acts Office